

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7424

Petition of Ledgewood on Okemo Condominium)
Owners Association ("Ledgewood") for)
Declaratory Ruling and Consumer Complaint re)
Provision of Water Service to Ledgewood by)
Okemo Realty, Inc., and Winterplace at Okemo)
Condominium Owners Association, Inc.)

Order entered: 7/28/2009

RULING ON MOTION OF OKEMO LIMITED LIABILITY COMPANY
TO FILE BRIEFS AS *AMICUS CURIAE*

On May 4, 2009, Okemo Limited Liability Company ("OLLC") filed a motion to file briefs as an *amicus curiae* in this proceeding pursuant to Rule 2.209(B) of the Rules of Practice of the Public Service Board ("Board"). Ledgewood on Okemo Condominium Owners Association ("Ledgewood") filed a response opposing the motion on May 15, 2009, which it supplemented on May 19, 2009. The Department of Public Service ("Department") filed a response on May 20, 2009, in which it also recommended denial of the motion. Winterplace at Okemo Condominium Owners Association, Inc. ("Winterplace") filed a notice on May 7, 2009, indicating that it had no objection to the motion. Okemo Realty, Inc. ("Okemo Realty") did not file a response to the motion. OLCC filed a reply to the responses of Ledgewood and the Department on May 28, 2009. On July 16, 2009, Kettle Brook Condominium Owners' Association ("Kettle Brook"), which like OLCC is not a party to this proceeding, made a filing in opposition to OLCC's motion.

In its motion, OLCC states that it has provided water service to Kettle Brook since 1984 and is in a similar position to Okemo Realty and Winterplace in that it does not hold a Certificate of Public Good ("CPG"). OLCC is concerned that the Board's resolution of the current proceeding "may impact a future Board determination as to whether and to what extent it should

impose penalties on OLCC for operating a water system without having obtained CPG." The legal issue of whether the Board has authority to order restitution of all moneys collected by a company selling water without a CPG is of particular concern to OLCC.

Rule 2.209(B) provides for permissive intervention by a non-party to a proceeding "when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding." The rule requires consideration of the following factors in the exercise of discretion on permissive intervention:

- (1) whether the applicant's interest will be adequately protected by other parties;
- (2) whether alternative means exist by which the applicant's interest can be protected; and
- 3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

As OLCC correctly points out, the Board, in some instances, has imposed a lower standard for *amicus curiae* participation and has allowed *amicus curiae* participation in situations in which a person does not meet the requirements for permissive intervention, but "is in a position to provide a valuable, and potentially distinct, perspective" on an issue.¹ In general, a lower standard seems appropriate when a entity, such as OLCC, intends to limit its participation to the submission of legal briefs rather than to be a fully active party. In addition, although the deadline for motions to intervene in this docket has long passed,² I would not view that deadline for active party participation as necessarily precluding subsequent requests to submit legal briefs as an *amicus curiae*.

Nevertheless, this is not an appropriate situation to permit *amicus* participation by OLCC. OLCC forthrightly states that it may be a party to a future Board proceeding involving the same legal issues. In fact, Kettle Brook subsequently filed a complaint against OLCC on July 16, 2009, for operating a water company without a CPG. That proceeding, and not this one, is the appropriate place for OLCC to make its legal case.

1. Docket 7273, "Investigation into Vermont Electric Cooperative, Inc.'s Service Quality and Reliability," Order re Motion to Intervene of July 15, 2007, at 4. *See also* Docket 7404, "Petition of Entergy Nuclear Vermont Yankee, *et al.*," Order re Motion to Intervene of May 5, 2008.

2. The scheduling order of May 21, 2008, set June 3, 2008, as the deadline for motions to intervene in this docket.

OLCC will be free to advance its legal arguments in its own proceeding, including any arguments that it believes were not raised adequately in this docket. And, as the Department noted in its response to OLCC's motion (at 1-2), application of a prior precedent in this docket will not preclude a contrary conclusion in a future docket that both precedents were wrongly decided. In response to concerns expressed by Ledgewood about the effect OLCC's participation might have on the interests of OLCC's own customers, OLCC itself observed that the outcome in this proceeding "will not result in *res judicata*, and all parties will be able to fully develop their positions in a later PSB proceeding." (OLCC Reply at 5). In its filings, therefore, OLCC has not demonstrated a substantial interest which may be affected by the outcome of this proceeding.

Furthermore, according to OLCC's own motion, two parties in this case, Okemo Realty and Winterplace, are in a similar position to itself. Both Okemo Realty and Winterplace are represented by counsel, who can be expected to raise all legal issues they deem relevant to the resolution of this proceeding. In contrast to other dockets in which the Board has permitted *amicus* participation by an entity that does not meet the requirements applicable to permissive intervention under Rule 2.209(B), it is not clear how OLCC's perspective is distinct and unique from that of Okemo Realty and Winterplace. A concern that similarly situated parties may not raise all the legal issues that a party in a potential future proceeding might raise on its own behalf provides an insufficient basis for granting an *amicus* motion.

More fundamentally, though, if one accepts OLCC's contention that the Board's resolution of the proceeding in this docket may have an effect (presumably, precedential) on future Board determinations, this consideration is no less applicable to Kettle Brook and any other customers of OLCC. In its reply to the responses of Ledgewood and the Department (at 5), OLCC notes that OLCC's "customers can seek *amicus* status if they desire." Yet such a resolution, in which potential parties to a future proceeding are granted limited intervention rights to argue legal issues in a proceeding other than their own, is contrary to the orderly management of separate dockets and the general principle that legal disputes are adjudged among the parties to that dispute (and not with the participation of potential future litigants having similar issues).

Accordingly, OLCC's motion to file briefs as an *amicus curiae* in this proceeding is denied.

SO ORDERED.

Dated at Montpelier, Vermont, this 28th day of July, 2009.

s/Lars Bang-Jensen
Lars Bang-Jensen
Hearing Officer

OFFICE OF THE CLERK

FILED: July 28, 2009

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)